

# HOWARD & HOWARD

ATTORNEYS  
Established 1869

DOCKET FILE COPY ORIGINAL

The Pinehurst Office Center, Suite 101  
1400 North Woodward Avenue  
Bloomfield Hills, Michigan 48304-2856

Telephone (810) 645-1483  
Fax (810) 645-1568

The Kalamazoo Building, Suite 400  
107 West Michigan Avenue  
Kalamazoo, Michigan 49007-3956

Telephone (616) 382-1483  
Fax (616) 382-1568

The Phoenix Building, Suite 500  
222 Washington Square, North  
Lansing, Michigan 48933-1817

Telephone (517) 485-1483  
Fax (517) 485-1568

The Creve Coeur Building, Suite 200  
321 Liberty Street  
Peoria, Illinois 61602-1403

Telephone (309) 672-1483  
Fax (309) 672-1568

JOHN W. ALLEN † \*  
KELLY A. ALLEN  
GUSTAF R. ANDREASEN  
WILLIAM G. ASIMAKIS, JR.  
DANIEL L. BAKER  
GERRY BARTLETT-McMAHON  
ROBERT C. BECK  
ANTOINETTE BEUCHE  
ROBERT L. BIEDERMAN †  
LORI B. BOBBITT  
WALTER J. BORDA  
FERNANDO A. BORREGO \*  
ERIC E. BREISACH  
TAMMY L. BROWN  
PHILIP T. CARTER  
JEFFREY P. CHALMERS  
TODD D. CHAMBERLAIN  
MICHAEL L. CHOJNOWSKI  
KEVIN M. CHUDLER  
CHRISTOPHER C. CINNAMON  
CAROLYN M. CLAERHOUT  
WILLIAM J. CLEMENS \*  
DAVID C. COEY  
MATTHEW J. COFFEY

THOMAS L. COOPER  
MICHAEL G. CRUSE  
THOMAS R. CURRAN, JR.  
CHRIS T. DANIKOLAS  
MARK A. DAVIS  
WILLIAM A. DORNBOSS  
JON S. FALETTA \*  
STEPHEN C. FERLMANN \*  
RICHARD D. FRIES +  
JAMES H. GEARY  
JOHN GERALD GLEESON \*  
EDGAR G. GORDON  
PAUL GREEN  
ROGER M. GROVES \*  
BRUCE R. GRUBB  
WADE E. HADDAD  
MICHELE L. HALLORAN  
RICHARD L. HALPERT  
PATRICK D. HANES  
ELLEN M. HARVATH  
JOHN G. HAYWARD  
JOSEPH B. HEMKER † \*  
FREDERICK G. HOFFMAN \*  
DAVID L. HOLMES

WILLIAM H. HONAKER □  
JOHN C. HOWARD  
TIMOTHY J. HOWARD \*  
DIANA M. JAGIELLA \*  
ROBERT B. JOHNSTON  
J. MICHAEL KEMP \*  
DANIEL N. KING \*  
JON H. KINGSEPP  
STEVEN C. KOHL  
JAMES H. KONING  
TIMOTHY E. KRAEPEL  
PETER J. LIVINGSTON  
JAMES E. LOZIER  
D. CRAIG MARTIN  
ROBERT F. MELONE \*  
CLAUDE HENRY MILLER  
ROBERT D. MOLLHAGEN † \*  
C. DOUGLAS MORAN  
LAWRENCE J. MURPHY † \*  
THEODORE W. OLDS □  
SUSAN E. PADLEY  
CHARLES C.S. PARK  
GARY A. PETERS † \*  
MARTHA A. PROCTOR

JEFFREY G. RAPHELSON  
BRAD A. RAYLE  
BRIAN J. RENAUD  
DAVID E. RIGGS  
BLAKE K. RINGSMUTH  
LEONARD W. SACHS \*  
BONNIE Y. SAWUSCH  
DEBORAH M. SCHNEIDER  
RAYMOND E. SCOTT □  
MICHAEL V. SUCAET  
THOMAS J. TALLERICO \*  
LAURA A. TALT  
SANDRA M. TRAICOFF \*  
DONALD F. TUCKER  
PATRICK R. VAN TIFLIN  
SHAMRA M. VANWAGONER  
JACQUELINE K. VESTEVICH  
STEVEN H. WESTON  
JAMES C. WICKENS  
MYRA L. WILLIS  
TIMOTHY M. WITTEBORT  
THOMAS J. WUORI  
JOHN E. YOUNG  
MARLA G. ZWAS

WILLIAM G. HOWARD  
(1846-1906)  
HARRY C. HOWARD  
(1871-1946)  
WILLIAM J. HOWARD  
(1904-1993)

ALL ATTORNEYS ADMITTED IN MICHIGAN ONLY,  
EXCEPT AS INDICATED.

\* ALSO ADMITTED IN DELAWARE  
+ ALSO ADMITTED IN DISTRICT OF COLUMBIA  
□ ALSO ADMITTED IN ILLINOIS  
† ALSO ADMITTED IN INDIANA  
\* ALSO ADMITTED IN IOWA  
† ALSO ADMITTED IN NEW YORK  
▽ ALSO ADMITTED IN OHIO  
+ ALSO ADMITTED IN PENNSYLVANIA  
+ ALSO ADMITTED IN TEXAS  
● ALSO ADMITTED IN VIRGINIA  
▲ ONLY ADMITTED IN ILLINOIS  
□ ONLY ADMITTED IN ILLINOIS AND MISSOURI  
□ ADMITTED TO PRACTICE BEFORE THE  
PATENT AND TRADEMARK OFFICE

**Kalamazoo Office**  
November 15, 1994

Direct Dial: (616) 382-9711

**Mr. William F. Caton**  
**Acting Secretary**  
**Federal Communications Commission**  
1919 M Street, NW  
Washington, D.C. 20554

**VIA: FEDERAL EXPRESS**

**Re: Comments of the Small Cable Business Association; MM Docket No. 92-266**

Dear Mr. Caton:

Enclosed are the original and 14 copies of the above-captioned Comments for filing. We have also enclosed a copy with a pre-addressed postage paid envelope and request that a file-stamped copy be returned to us.

The prompt dissemination of this information to the Commissioners and appropriate staff members is greatly appreciated.

If you have any questions or need additional information, please call us.

Very truly yours,

HOWARD & HOWARD



Eric E. Breisach

RECEIVED

NOV 16 1994

FCC MAIL ROOM

No. of Copies rec'd 0415  
List A B C D E

Enclosures

cc: Mr. David D. Kinley  
Ms. Susan Costantino

\\361\eeb\scba\caton.c8

DOCKET FILE COPY ORIGINAL

RECEIVED

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

NOV 16 1994

FCC MAIL ROOM

In the Matter of )

Implementation of Sections of )  
The Cable Television Consumer )  
Protection and Competition Act )  
of 1992 )

Rate Regulation )

MM Docket No. 92-266

**COMMENTS  
TO THE  
FURTHER NOTICE OF PROPOSED RULEMAKING**

**Prepared by:**

**SMALL CABLE BUSINESS ASSOCIATION**

**Eric E. Breisach  
Christopher C. Cinnamon**

**HOWARD & HOWARD  
107 W. Michigan Ave., Suite 400  
Kalamazoo, Michigan 49007**

**Attorneys for the  
Small Cable Business Association**

**Dated: November 15, 1994**

## TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY .....	1
II. INTRODUCTION .....	4
III. THE COMMISSION NEEDS TO REVIEW AND REVISE COMPANY AND SYSTEM SIZE STANDARDS NOW .....	5
A. The Commission Has Properly Embraced The Two Relevant Measures Of Cable Company Operations; Company Size and System Size .....	5
1. Company size .....	5
2. System size .....	6
B. The Current Size Standards Are Wholly Inadequate .....	6
1. The 15,000 Subscriber Definition Of A Small Operator Is Under-Inclusive .....	7
a. U.S. Small Business Administration Standards .....	7
b. FCC Broadband Personal Communications Service Standards .....	8
c. FCC Small Telephone Company Standards .....	10
d. Comments By Commissioners .....	13
2. The MSO Subscriber Cap Is Illegal At Worst, Under-Inclusive At Best .....	13
3. System Size Standards Are Totally Deficient .....	14
C. Action Cannot Wait Until Completion Of The Cost Studies .....	14
1. Relief Is Needed Now .....	14
2. All Relief Is Transitory .....	14
3. The Cost Studies Will Take Time To Complete .....	15

IV.	MUCH EXPANDED DEFINITIONS OF SMALL OPERATORS AND LIMITATIONS FOR SMALL SYSTEM OWNERSHIP MUST BE ADOPTED .....	16
A.	The Commission Should Welcome The Opportunity To Reduce Burdens For Small Cable Operators And Systems .....	16
B.	The Commission Has "Welcomed" The Opportunity To Reduce Regulatory Burdens For Small Telephone Companies .....	17
C.	The Commission Faced Identical Circumstances Surrounding Small Telephone Companies And Still Granted Relief .....	18
V.	A SMALL CABLE OPERATOR IS ONE WITH \$100 MILLION OR LESS OF REVENUE FROM REGULATED SERVICES .....	20
A.	A Cable Operator With Less Than \$100 Million In Revenue Should Be Classified As A Small Operator .....	20
B.	A Small Cable Company Needs Revenues Of At Least \$40 Million To Access Capital Markets .....	21
C.	When Adjusted For Unique Characteristics Of The Cable Television Industry, The Number Of Access Lines Is In Line With The \$100 Million Regulated Revenue Standard .....	22
1.	The Basic Standard - A Small Telephone Company is One With 100,000 Or Fewer Access Lines .....	22
2.	The Telephone Company Standard Must Be Adjusted For Lower Penetration Rates Of Cable Television Operators .....	23
3.	The Telephone Standard Must Also Be Adjusted For The Inherent Riskiness Found In Cable Television Companies Because They Are Not Utilities .....	23
4.	A 500,000 Subscriber Small Business Definition Only Slightly Exceeds The \$100 Million Regulated Revenue Standard .....	25
VI.	THE SMALL MSO CAP ON SMALL SYSTEM RELIEF SHOULD BE REMOVED, OR AT A MINIMUM GREATLY ENLARGED .....	26
A.	The MSO Cap Was Imposed In Direct Conflict With Congress' Mandate To Provide Relief To All Small Systems .....	26

B.	Any Subscriber Cap Needs To Be Significantly Expanded . . . . .	26
C.	The Appropriate Measure of Cable System Size Is Each Franchise Area, Not The Franchise Areas Connected To A Common Headend .	27
D.	Relief Is Needed Because Of The High Per Subscriber Cost Of Regulation For Small Systems . . . . .	30
VII.	SUBSTANTIVE RATE RELIEF MUST BE PROVIDED SMALL OPERATORS AND SMALL SYSTEMS . . . . .	31
A.	National Cost Averaging . . . . .	32
B.	Benchmark Adjustments . . . . .	32
C.	Net Income Tests . . . . .	32
D.	Revised Interim Cost-Of-Service Rules . . . . .	33
E.	Cash Flow Considerations . . . . .	33
F.	Burden Reduction . . . . .	33
G.	Other Methodologies . . . . .	34

## **I. SUMMARY**

The Commission has asked whether it should commence a rulemaking to review and possibly revise the definitions used to determine whether a cable company should be treated as a small operator. Given that the current small operator definition was promulgated without public notice and comment, and without the approval of the Small Business Administration as required by federal law, the answer can be given without hesitation. Absolutely.

The current 15,000 subscriber (approximately \$4.0 million in revenue) definition of a small cable operator that was adopted without any evidence on the record, other than the Commission's "belief", must be set aside. The analysis must not begin by attempting to adjust or in anyway build upon the 15,000 subscriber number; one must start from scratch.

The reasons for affording cable operators small business and/or small system protections are twofold. First, small operators and systems must be able to retain and attract capital. Second, the Commission must avoid the unnecessary and disproportionate imposition of regulatory burdens on small operators and is required by statute to minimize the burdens on all operators and especially on small systems.

Comparisons to small company definitions in the telephone and broadband PCS arenas are telling. The broadband PCS definition of a small business is one with \$40 million or less in annual receipts. This is ten times the Commission's current cable television standard.

In the broadband PCS decision, the Commission articulated a bright-line test which found that companies with less than \$40 million of revenues do not have access to the necessary capital markets. This only addresses one of the factors, it does not address

minimization of regulatory burdens. Nevertheless, the definition of a small cable business cannot fall below \$40 million in annual receipts.

The Commission, however, has been far more generous in its definitions of small telephone companies, allowing for companies with up to \$100 million of regulated revenue to qualify for reduced regulatory burdens. For example, 98.5 percent of all telephone companies providing local exchange services are classified as small companies under this standard.

Companies with up to \$75 and \$125 million in revenues also received preferential treatment in broadband PCS license bidding and payment preferences. In that same order, the Commission, when establishing small telephone company definitions, even referred to a "truly rural area" as one which could have up to 263,000 residents.

For other regulatory purposes, the Commission has suggested that telephone companies with 100,000 or fewer access lines is the appropriate measure. To translate this access line standard into cable television subscribers requires certain adjustments. First, it takes twice as much cable television plant to serve the same number of subscribers because cable penetration is only half of telephone's nearly 100 percent penetration. Therefore, the 100,000 needs to be doubled to 200,000 subscribers. Secondly, because cable television is not a utility, it is much more vulnerable to the effects of regulatory burdens and requires greater protection. Based on differences in elasticities of demand, the cable industry is about two and a half times riskier than the telephone industry. Therefore, the appropriate subscriber count for small cable business classification would be approximately 500,000 subscribers.

While the 500,000 subscriber figure may sound high, the Commission's \$100 million revenue standard translates to approximately 416,000 subscribers. All factors point towards a small business definition between 400,000 and 500,000 subscribers. For the sake of simplicity, SCBA suggests that the \$100 million measure of regulated revenues is the appropriate definition for identifying small cable businesses.

SCBA has previously articulated its concerns questioning the validity of the MSO subscriber cap which limits small system relief. In all events, the current cap is simply too low, affording the potential for "relief" to only 16 companies that are not classified as small operators. If the cap is to remain, it must be significantly expanded. The Commission also needs to modify the way it defines a "small system." Because the administrative burdens created by regulation are proportionate to the number of franchise areas, the appropriate measure of small systems is to measure the number of subscribers in each franchise area, not per headend.

Finally, the Commission must act now to bring rates computed in accordance with regulations into line with reality for small systems and small operators. Although not formally part of this docket, the Commission must review the various rate regulation alternatives proposed by SCBA and others. Several of SCBA's proposals, although drafted at the request of Cable Services Bureau staff and submitted on the record, have never been considered in the Commission's rulemakings. They have simply been ignored. These proposals by SCBA and others have merit and warrant the Commission's serious and immediate attention.



## **II. INTRODUCTION**

The Small Cable Business Association ("SCBA") is a self-help group formed by small cable operators faced with an unprecedented labyrinth of overwhelming regulations. SCBA's primary purpose is to help small operators learn, understand and implement the new requirements.

SCBA is barely one year old. Several small operators decided to meet in Kansas City on Saturday May 15, 1993. Word of the meeting spread and one hundred operators attended. The Small Cable Business Association was formed by the end of the day.

From these simple beginnings, SCBA has rapidly grown to over 340 members. More than half of them have fewer than 1,000 subscribers in total. SCBA continues its mission to educate and assist small operators using unpaid, volunteer leadership. SCBA has been very active in the rulemaking process in this Docket.

### III. THE COMMISSION NEEDS TO REVIEW AND REVISE COMPANY AND SYSTEM SIZE STANDARDS NOW.

#### A. The Commission Has Properly Embraced The Two Relevant Measures Of Cable Company Operations: Company Size and System Size.

##### 1. Company size.

Almost a full year after it issued its first rate order<sup>1</sup> the Commission officially recognized that the small system measure mandated by Congress<sup>2</sup> was not the exclusive relevant measure of a cable system owner's ability to absorb the impact of rate regulation. The Commission was concerned with "those companies that do not have access to the financial resources or other purchasing discounts of larger companies."<sup>3</sup>

The Commission, without giving more than its "belief"<sup>4</sup>, or seeking public input<sup>5</sup> determined that a small operator (i.e., small business) was one with 15,000 or fewer total

---

<sup>1</sup>Small operator definitions were first established in the *Second Order on Reconsideration, In the Matter of the Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266 (Released March 30, 1994) ("*Second Reconsideration Order*") which was issued almost one year after the initial *Report and Order In the Matter of the Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266 (Released May 3, 1993) ("*Rate Order*").

<sup>2</sup>47 U.S.C. §543(i).

<sup>3</sup>*Second Reconsideration Order* at fn. 157.

<sup>4</sup>*Second Reconsideration Order* at ¶120. ("We believe that operators who exceed this revenue level are sufficiently large....")

<sup>5</sup>The establishment of a small company size definition was done without any prior public notice or opportunity to comment.

subscribers. The Commission equated this size standard to a company with approximately \$3.6 to \$4.5 million in gross annual receipts<sup>6</sup>.

2. System size.

Congress mandated that, at a minimum, the Commission must craft regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers<sup>7</sup>. Although the Commission was required to "seek to reduce the administrative burden on...[all] cable operators"<sup>8</sup>, it was clearly required to give systems of 1,000 and fewer subscribers special treatment.

The Commission crafted special regulations for small systems, however, contrary to its statutory mandate, it made the relief available only to certain small systems. Only those systems that are either independently owned or owned by a multiple system operator ("MSO") that: (1) has 250,000 or fewer total subscribers; (2) owns only systems with fewer than 10,000 subscribers; and (3) has an average system size of 1,000 or fewer subscribers<sup>9</sup> (an MSO meeting all of these requirements is referred to as a "Small MSO").

B. The Current Size Standards Are Wholly Inadequate.

Both the classifications of small operators and the limitations placed on small systems through the Small MSO restrictions, are wholly inadequate as they fail to include entire

---

<sup>6</sup>*Second Reconsideration Order* at ¶120.

<sup>7</sup>47 U.S.C. §543(i).

<sup>8</sup>47 U.S.C. §543(b)(2)(A).

<sup>9</sup>47 C.F.R. §76.922(5)(A).

companies and systems that require shelter from the full brunt of rate rollbacks and the cost of administering rate regulations.

1. The 15,000 Subscriber Definition Of A Small Operator Is Under-Inclusive.

When examining the appropriateness of the 15,000 subscriber standard, the natural tendency is to compare any new standard to the 15,000 subscriber number. This is inappropriate; the 15,000 subscriber number was illegally devised and simply has no support in the record<sup>10</sup>. Even though the 15,000 subscriber measure is deeply etched in the psyche because it was clothed in credibility as the product of an "expert regulatory agency", the slate must be wiped clean.

This begs the question: If 15,000 subscribers is too small, then just how big is small? To establish the requisite perspective, it is appropriate to examine other established size standards.

a. U.S. Small Business Administration Standards.

The United States Small Business Administration, through notice and comment rulemaking, has established various size standards. A small cable company is defined as one with up to \$11 million of gross annual receipts<sup>11</sup>.

---

<sup>10</sup>The United States Small Business Administration and the Small Cable Business Association have repeatedly stated on the record of this rulemaking that the Commission failed to follow the provisions of the Small Business Act and the Regulatory Flexibility Act when promulgating the 15,000 subscriber standard. Also as previously noted, the 15,000 subscriber standard is based merely on a "belief" without any authoritative citations. Finally, the Commission's actions are currently under review of the United States Court of Appeals. *Time Warner Entertainment Co., L.P., v. Federal Communications Commission*, No. 93-1723 (D.C. Cir.).

<sup>11</sup>13 C.F.R. §121.601 revised for inflation, see 59 Fed. Reg. 16,513 (April 7, 1994).

This definition was derived to establish, among other things, the threshold below which Small Business Administration financing is available. It was not developed to establish the threshold for imposing regulatory burdens. In fact, the Small Business Administration has filed comments in response to the *Further Notice of Proposed Rulemaking* stating that the \$11 million standard is much too low for determining regulatory burdens<sup>12</sup>. Even though the \$11 million standard is much too low, it is still four times greater than the Commission's current standard.

b. FCC Broadband Personal Communications Service Standards.

The most recently established small business definitions are those in the broadband personal communications services ("PCS") rulemaking<sup>13</sup>. Although the Commission had initially adopted the Small Business Administration's definition of a small business (i.e., net worth not in excess of \$6 million with average net income after Federal income taxes for the two preceding years not in excess of \$2 million)<sup>14</sup>, this standard has subsequently been increased by the Small Business Administration to net worth of \$18 million and annual after-tax income of \$6 million<sup>15</sup>.

---

<sup>12</sup>The United States Small Business Administration in *Comments* filed November 16, 1994 in this docket offer a number of appropriate definitional options, including the \$100 million regulated revenue standard proposed by SCBA.

<sup>13</sup>In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Report and Order*, PP Docket No. 93-253 (Released July 15, 1994) ("*Broadband PCS Order*").

<sup>14</sup>*Id* at ¶172.

<sup>15</sup>59 Fed. Reg. 16953, 16956 (April 8, 1994).

Upon reconsideration, the Commission determined that it needed to "adjust this definition upward to accommodate capital intensive telecommunications businesses."<sup>16</sup> The Commission accepted the recommendation of the Chief Counsel for Advocacy of the Small Business Administration that a net worth test be abandoned and a revenue standard of \$40 million be adopted.

The Commission adopted this \$40 million revenue standard<sup>17</sup>. Equally as important is to examine why this standard was deemed appropriate:

(1) Access to Capital. The Small Business Administration stated, and the Commission agreed, that the \$40 million standard "isolated those companies that have significantly greater difficulty in obtaining capital than larger enterprises."<sup>18</sup> This was not a PCS related determination. It drew a line between those entities that have the ability to access capital markets. The Commission's decision in the PCS docket is irreconcilable with its determination in this docket. How can the Commission determine on in the cable docket that companies with more than \$3.6 million of revenues can access capital markets but in another docket that the same line is drawn at \$40 million? It cannot.

(2) Ability to Compete. The Small Business Administration stated, and the Commission agreed, that a company with more than \$40 million in annual revenues "is sufficiently large that it could survive in a competitive wireless communications market."

---

<sup>16</sup>*Id.*

<sup>17</sup>47 C.F.R. §24.720(B)(1).

<sup>18</sup>*Ex parte* filing of the U.S. Small Business Administration, June 24, 1994 and *Fifth Report and Order* at ¶175.

(3) Participate in Small and Medium Sized Markets. The Commission also agreed that such companies would be "of sufficient size to meet demands in almost all small markets and some medium-size markets without significant outside financial assistance."<sup>19</sup>

(4) Other Measures. In addition to the \$40 million small business standard, the Commission also determined that companies with up to \$125 million in gross revenues and less than \$500 million in assets should be granted the right to bid on exclusive "entrepreneurs" blocks of PCS licenses. This revenue standard equates to over 500,000 subscribers of regulated services<sup>20</sup>.

In summary, the Commission has embraced three relevant measures to be included in the determination of what constitutes a small business: (1) no or limited access to capital markets; (2) inability to compete because of size (presumably because of lack of economies of scale); and (3) inability to meet the demands of all small and some medium-size markets without significant outside financial assistance."

c. FCC Small Telephone Company Standards.

The Commission has established small telephone company standards for several purposes. The Commission has divided telephone companies into two groups to determine record keeping burdens: (1) Class A companies; and (2) Class B companies. The dividing line between the large Class A companies and the small Class B companies is \$100 million

---

<sup>19</sup>*Broadband PCS Order* at ¶175 citing *Comments* of the Small Business Administration Office of Advocacy at 10.

<sup>20</sup>For smaller operators, it is SCBA's experience that the total rate, on average, for regulated service tiers averages \$20.00.

in regulated annual revenues<sup>21</sup>. SCBA estimates that smaller cable companies have rates approximating \$20 per subscriber per month from the provision of regulated services. This translates the \$100 million telephone revenue threshold into approximately 416,000 subscribers. Currently, reduced record keeping is only available to systems with 1,000 or fewer subscribers that are owned by small operators (15,000 or fewer subscribers) or one of 16 other larger companies<sup>22</sup>. This is a far cry from a \$100 million standard.

This, however, is not the Commission's sole measure of what constitutes a small telephone company. The Commission allows telephone companies to affiliate with the National Exchange Carrier Association ("NECA") for purposes of establishing rates and filing tariffs. Members of NECA are broken into three groups<sup>23</sup>:

- (1) Most Bell System Operating Companies;
- (2) All other telephone companies with more than \$40 million in operating revenues; and
- (3) All other telephone companies.

This \$40 million gross revenue amount is arguably comparable to the gross revenue amount used in the broadband PCS docket. This standard, however, is only used to categorize the representation of various sizes of companies on the NECA board of directors. It does not

---

<sup>21</sup>47 C.F.R. §32.11(a).

<sup>22</sup>The only reduced record keeping requirement allows a limited number of small systems to avoid adopting the uniform system of accounts when using cost-of-service filings. 47 C.F.R. §76.924(d)(1).

<sup>23</sup>47 C.F.R. §69.902(a).



establish a regulatory threshold in and of itself; that threshold can be found in regulations unrelated to NECA.

The Commission recently established its current definition of a small telephone company. A small telephone company has greatly reduced compliance burdens and greater rate flexibility. The Commission has determined that a small telephone company is one with 50,000 or fewer access lines in a "study area."<sup>24</sup> A "study area" typically includes a telephone holding company's operation within a single state.<sup>25</sup> Therefore, a telephone company may provide service to multiple exchanges in different states and have well over 50,000 access lines nationally and still be classified as a small telephone company so long as total revenues do not exceed \$40 million and it is not affiliated with a Bell System Operating Company (it must qualify under subset 3 of the NECA board of directors classification)<sup>26</sup>. This standard benefitted 1,128 of the 1,350 companies providing local exchange services<sup>27</sup>.

The Commission recently adopted an even more liberal definition of a small telephone company. In its broadband PCS docket, the Commission determined that a "rural" (i.e., small) telephone company was one that had 100,000 or fewer access lines,

---

<sup>24</sup>See, e.g., 47 C.F.R. §61.38 and 69.3(a).

<sup>25</sup>In the Matter of Regulation of Small Telephone Companies, *Report and Order*, CC Docket No. 86-467 (Released June 29, 1987) ("*Small Telco Order*") at fn. 13.

<sup>26</sup>*Small Telco Order* at ¶9.

<sup>27</sup>In the Matter of Regulation of Small Telephone Companies, *Notice of Proposed Rulemaking*, CC Docket No. 86-467 (Released December 12, 1986).

including all affiliates<sup>28</sup>. The Commission selected this measure because it "target[ed] only those telephone companies whose service territories are predominantly rural in nature...."<sup>29</sup>

d. Comments By Commissioners.

The only Commissioner to comment on the ability of cable operators to cope with regulatory burdens was Commissioner Andrew Barrett. When the Commission floated the concept of imposing a company size cap on the relief afforded small systems, he suggested that possibly companies with fewer than 400,000 subscribers could not cope with the burdens imposed by the new regulations<sup>30</sup>.

2. The MSO Subscriber Cap Is Illegal At Worst, Under-Inclusive At Best.

Despite its Congressional mandate to reduce administrative burdens for all systems with 1,000 or fewer subscribers, the Commission has drastically limited the potential class of systems eligible for such relief. The Commission has limited the relief to systems of 1,000 or fewer subscribers either independently owned or owned by a Small MSO<sup>31</sup>.

Concerns about the legality of an MSO subscriber cap aside, the company size component of the cap was set at 250,000 subscribers. Although SCBA does not endorse a cap of any size, a company size definition of a quarter of a million subscribers is significantly greater than the 15,000 subscriber company standard that the Commission adopted when defining a small business.

---

<sup>28</sup>*Broadband PCS Order* at ¶193.

<sup>29</sup>*Broadband PCS Order* at ¶198.

<sup>30</sup>Concurring Statement of Commissioner Andrew C. Barrett dated August 10, 1993.

<sup>31</sup>47 C.F.R. §76.922(b)(5).

3. System Size Standards Are Totally Deficient.

The existing criteria used to determine what constitutes a small business cover a wide range. Size standards based on annual revenue standards range from \$11 million to \$100 million of regulated revenues. Those based on customer base range from 100,000 customers to 250,000 customers. In all events, by comparison, the standards the Commission applies to cable television operators of approximately \$4.0 million in revenues or 15,000 subscribers are disproportionately small.

C. Action Cannot Wait Until Completion Of The Cost Studies.

1. Relief Is Needed Now.

The types of companies and systems that should be entitled to relief from both the harsh impact of full rate regulation and the administrative cost of compliance need relief *now*. The ability of such companies and systems to comply with existing regulation eliminates their ability to expand into new areas or offer new services. In many cases, their ability to survive is in question.

2. All Relief Is Transitory.

As regulations currently stand, all substantive rate relief offered small operators or small systems is transitional in nature. It will be terminated upon completion of the cost studies<sup>32</sup>. Therefore, under the current framework, it makes no sense to adopt new

---

<sup>32</sup>Operators with 15,000 or fewer subscribers are protected only against the second round of rate rollbacks such time as the cost studies are completed, at which time those operators must adopt the full reduction rate in effect at that time. Furthermore, small operators electing streamlined rate relief, if anyone actually adopted that method, must reduce rates to full reduction levels upon completion of the cost studies and complete and file all appropriate forms.

business size definitions effective only after virtually all relief afforded smaller operators and systems is terminated. Therefore, to obtain the required relief, truly small operators and systems cannot wait until completion of the cost studies.

3. The Cost Studies Will Take Time To Complete.

The cost studies, no matter how beneficial their outcome, remain an event to occur in the future. How far in the future is anyone's guess. If done properly, accumulating, analyzing and interpreting the data will likely take twelve to eighteen months. It is also unknown when work will begin as the Commission needs to be able to dedicate already overworked staff resources to begin the cost studies.

Various members of the Commission and Cable Services Bureau staff have assured SCBA that it will be consulted during the process, beginning with design of the surveys. To date, SCBA has not been asked to provide input to the cost studies. SCBA therefore concludes that the Commission has not yet begun substantial work on the cost studies.

At least one Commissioner publicly addressed the need for quick resolution of the cost studies. In the separate statement of Commissioner Andrew C. Barrett, he stated that "I believe that these studies must be completed as soon as possible before the end of 1994 in order to promote the certainty that will enable all operators to develop future business plans." SCBA concurs. Nevertheless, no matter how well intentioned, the cost studies will simply take time to properly execute.

#### **IV. MUCH EXPANDED DEFINITIONS OF SMALL OPERATORS AND LIMITATIONS FOR SMALL SYSTEM OWNERSHIP MUST BE ADOPTED.**

The Commission established two criteria for defining small operators in the *Second Reconsideration Order*. The first was the ability to attract capital; the second, the ability to withstand the impact of rate reductions<sup>33</sup>. Included in the considerations regarding system size was the ability of a company, taken as a whole, to have the economies of scale and the administrative staff to cope with rate regulation<sup>34</sup>. The various factors to consider and compare relative to other regulated businesses are discussed below.

##### **A. The Commission Should Welcome The Opportunity To Reduce Burdens For Small Cable Operators And Systems.**

The Commission has attempted to balance the needs of smaller companies and systems and those of subscribers for reasonable rates. Unfortunately, the balance has never truly been achieved. If the scales had not been perpetually tipped against small operators and systems, the instant rulemaking would not have been necessary.

SCBA merely asks for parity with the treatment afforded small telephone companies. The Commission faced identical balancing considerations in those telephone company rulemakings. In the case of telephone companies, the Commission followed the Congressional mandate:

---

<sup>33</sup>*Second Reconsideration Order* at ¶120.

<sup>34</sup>In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, *Memorandum Opinion And Order And Further Notice Of Proposed Rulemaking*, MM Docket 92-266 (Released August 10, 1993) at ¶23.

[T]o make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges.<sup>35</sup>

In the 1992 Cable Television Consumer Protection and Competition Act ("1992 Cable Act"), Congress established a similar policy goal:

[T]o...ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable system.<sup>36</sup>

B. The Commission Has "Welcomed" The Opportunity To Reduce Regulatory Burdens For Small Telephone Companies.

When the Commission revisited the regulation of small telephone companies, upon the petition of an industry trade association<sup>37</sup>, it acknowledged that:

[W]hile federal regulatory burdens on small telephone companies are already modest, these burdens can be reduced further.<sup>38</sup>

The attitude of the Commission towards small telephone companies is summarized best in the following quote:

We welcome the opportunity presented by the USTA filing and the comments to consider whether additional reductions of the regulatory burdens for small telephone companies...are feasible.<sup>39</sup>

---

<sup>35</sup>47 U.S.C. §151.

<sup>36</sup>1992 Cable Act, §2(b).

<sup>37</sup>The Commission initiated a review of the regulation of small telephone companies at the request of the United States Telephone Association.

<sup>38</sup>In the Matter of Regulation of Small Telephone Companies, *Notice Of Proposed Rulemaking*, CC Docket No. 86-467 (Released December 12, 1986) ("*Small Telephone Company NPRM*").

<sup>39</sup>*Id* at ¶20 (emphasis added).

The Commission has an identical opportunity in the instant *Notice of Proposed Rulemaking* to determine whether additional reductions of regulatory burdens for small cable operators and systems are feasible. To date, the Commission has not even committed to undertake revision of the company size definitions, let alone revise the substantive rate standards for these companies or lessen the administrative burdens of regulatory compliance.

C. The Commission Faced Identical Circumstances Surrounding Small Telephone Companies And Still Granted Relief.

The Commission's primary regulatory thrust has been to offset the impact that being a "monopoly" provider of service has had on inflating rates above those that would have existed had effective competition been present. The best the Commission has done to date is to suspend the second round of rate reductions for companies with 15,000 or fewer subscribers. To take advantage of this transitional treatment, however, small operators must forego the inflation adjustments available to many other operators. The effect is to squeeze the small operator by continually decreasing its margins while the operators wait for the completion of the cost studies.

The Commission acknowledged that even small telephone companies "retain market power by virtue of their monopolies over the provision of local telephone service."<sup>40</sup> The Commission continued to acknowledge that "[n]o evidence is presented which indicates that alternative means of communication present any significant present competition to small telephone companies...."<sup>41</sup>

---

<sup>40</sup>*Id* at ¶48.

<sup>41</sup>*Id.*

Despite the absence of any counterbalancing market forces, the Commission expanded by 150 percent the small company definition proposed by the telephone industry itself; increasing the number of permitted access lines from 20,000 to 50,000 per study area<sup>42</sup>. One is compelled to ask why? According to the Commission, the access line threshold was increased because:

It would also reduce the burdens of additional companies, while not increasing in any substantial way the possible inaccuracies of overall industry rates.<sup>43</sup>

According to the Commission, the change in the size standard increased the number of qualifying companies from 1,106 to 1,128, affecting 3.2 percent of national market<sup>44</sup>. In essence, the Commission was willing to allow rates that might not be reasonable in one area, so long as the impact on rates nationally was not significant. The same consideration has never been afforded small cable television operators.

---

<sup>42</sup>*Id* at ¶7.

<sup>43</sup>*Id* at ¶37 (emphasis added).

<sup>44</sup>*Id* at ¶37.



**V. A SMALL CABLE OPERATOR IS ONE WITH \$100 MILLION OR LESS OF REVENUE FROM REGULATED SERVICES.**

As more fully justified below, SCBA proposes that a small cable operator be defined as one with \$100 million or less in revenue from regulated services. The various factors SCBA has taken into consideration are listed below:

**A. A Cable Operator With Less Than \$100 Million In Revenue Should Be Classified As A Small Operator.**

The Commission has distinguished between telephone companies of various sizes for determining levels of compliance with regulatory burdens. The Commission has drawn this line between those companies that earn \$100 million in regulated revenues and those that do not<sup>45</sup>. This measure is the appropriate delineation point to use to differentiate between small and large cable television operators. It is necessary to choose the highest possible definition of what constitutes a small cable business because of factors unique to the cable television industry. As outlined in detail below, in the final analysis, cable television operators are simply at much greater risk from the effects of regulatory burdens than are providers of utility services such as telephony.

Although this definition would bring many cable operators under the protective umbrella of the small business definition, the numbers of companies and subscribers potentially affected are very similar to existing telephone company breakdowns:

---

<sup>45</sup>47 C.F.R. §32.11(a)